

The answer to this question depends upon whether the Public Defender's Office can be classified as a "firm" for purposes of ER 1.10. The committee answered that question in the affirmative in its Opinion No. 89-08, supra:

"Although we have not addressed the issue explicitly before, we think it clear that a public defender's office should be considered a 'firm' for the purpose of this rule. Attorneys in a public defender's office are engaged in representing individual criminal defendants. Branti v. Finkel, 445 U.S. 507, 519, 100 S. Ct. 1287, 1295, 63 L. Ed. 2d 574 (1980) ('[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State'). Thus, such an office is highly analogous to a legal services organization or, more importantly, a private criminal defense firm, and should be treated as such. See Comment to ER 1.10 (lawyers employed in the legal department of an organization or in a legal services organization are a 'firm' within the meaning of the rule). Cf. Rodriguez v. State, 129 Ariz. 67, 74, 628 P.2d 950, 957 (1981) (Holohan, J., concurring) ('[t]he relationship of the public defender's office in the representation of indigent defendants should be no different than the representation of any client by a private law firm')."

Id. at 2. Accord Connecticut Opinion 90-30 (11/29/90) (ABA/BNA Lawyers' Manual of Professional Conduct p. 901: 2070) (all Public Defenders in the jurisdiction are considered members of one firm for conflicts purposes); North Carolina Opinion 65 (4/13/89) (ABA/BNA Lawyers' Manual, supra, pp. 901: 6611-6612) (Public Defenders who work in the same office, share secretarial support, and take direction from the same supervisor are treated as members of a single law firm for purposes of the confidentiality rules).

Once the Public Defender's Office is deemed a firm, then it is clear that the imputed disqualification provisions of ER 1.10(a) would preclude the type of conflicts representation proposed in this inquiry. Each lawyer in the Public Defender's Office, including those in the proposed juvenile conflicts division, would be prohibited from representing a defendant with a potential conflict with another client of the office. Indeed, the only jurisdiction which the committee has been able to find with a similar ethical opinion has reached precisely this conclusion. In Formal Opinion E-90-6 (9/24/90) (ABA/BNA Lawyers' Manual, supra, p. 901: 9112), the Wisconsin State Bar Committee on Professional Ethics concluded that the State Public Defenders Office, which had proposed to set up a conflicts division organized separately from its main trial division, was precluded from doing so by ER 1.7 and ER 1.10(a) of the Rules of Professional Conduct unless the clients waived the disqualification in writing after consultation. The Wisconsin State Bar Committee suggested

that the Public Defender may wish to petition the Supreme Court for amendment of the Rules to clarify its status as a firm under the proposed arrangement.<sup>1</sup>

The Public Defender seems to suggest that the screening mechanisms to be employed under his proposal would be adequate to prevent dissemination of confidential information between separate juvenile divisions. Screening, however, is not usually an adequate remedy for conflict under ER 1.7. See our Opinion No. 92-7 (June 19, 1992) (screening of Deputy Public Defenders for adverse clients would not be solution to conflict of interest); Westinghouse Electric Corporation v. Kerr-McGee Corporation, 580 F.2d 1311, 1321 (7th Cir. 1978) (representation of adverse clients by two officers of the same firm located in separate cities prohibited: "chinese wall" theory does not modify the usual presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm). Screening can be an effective remedy to avoid some conflicts involving a single lawyer such as moving from government to private employment. See ER 1.11(a)(1). It is a much different situation when a whole office with numerous lawyers must be "screened" from the remainder of the organization in all of its cases.<sup>2</sup>

The obvious rationale of ER 1.10(a) is the fear that confidential communications will be used against one of the clients. ER 1.10(a), however, does not require any showing that confidential information has actually been shared or even that the other lawyers in the firm have access to it. See G. Hazard, Jr. and W. Hodes, The Law of Lawyering, (2nd ed.), Section 1.10:201 at p. 325 (1992 Supp.). This automatic disqualification differs from ER 1.10(b) which requires a showing that a lawyer moving to another office has actually received confidential information to require disqualification of the new firm. The automatic bar of ER 1.10(a) seemingly arises from the difficulty of trying to ascertain what each lawyer in a firm knows about a client's case and the danger of accidental disclosure of confidential information to others in the firm during the course of representation. See G. Hazard, Jr. and W. Hodes, supra.

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<sup>1</sup> The Wisconsin State Bar Committee also noted another potential ethical problem in that another appellate division may have to be created because of possible conflicts between the main trial division and the conflicts division. Wisconsin Formal Opinion E-90-6 at 2. In the present inquiry, the Public Defender has not indicated how appeals would be handled from the separate juvenile divisions.

<sup>2</sup> The Ethical Rules recognize that screening may be appropriate in some circumstances where government legal officers are involved. See ER 1.11(a), ER 1.10 (Comment). This committee has concluded, however, that the Public Defender's Office does not fall within this exception. See our Opinion No. 89-08, supra, at 2.

Obviously, the Public Defender in this proposal is making substantial efforts to avoid any dissemination of confidential information between the separate juvenile divisions. However, when both divisions are subject to the same management structure, it is clearly possible that confidential information from each division will be communicated to those in supervisory positions. Indeed, in our Opinion No. 89-08, *supra*, we assumed that "a lawyer in a position of ultimate authority and oversight may acquire confidential information about all, or nearly all, of the cases handled by the office . . ." Opinion No. 89-08 at 4. These problems highlight the reason why ER 1.10(a) imposes a blanket rule of disqualification if any lawyer in a firm, practicing alone, would have a conflict.

And, more importantly, this committee believes that the very reason for avoiding conflicts in the first place could be compromised by this proposal, however well-intentioned. The Comment to ER 1.10 directs attention in doubtful cases to the "underlying purpose of the [conflict] rule that is involved." One of the underlying purposes of the conflict of interest prohibition in ER 1.7 is to assure clients of the lawyer's undivided loyalty. Clients of the Public Defender cannot be expected to know about the extensive screening between juvenile divisions. For all practical purposes, clients in direct conflict would assume that each was represented by the Public Defender. There is clearly a potential for counsel's loyalty to be questioned by those outside the system, despite the best intentions of the Public Defender, when one division's client may be cooperating and testifying against the client of another.

The Arizona Supreme Court has recognized this danger and allowed a Public Defender to withdraw when that office had previously represented a potential witness. Rodriguez v. State, 129 Ariz. 67, 628 P.2d 950 (1981). The Court permitted withdrawal in that case despite the fact that it could not be shown that the Public Defender had utilized any confidences obtained from the previous client. It concluded that the previous client/witness would likely assume that such confidences were used if he testified at trial. This would be detrimental to the whole system because it would undermine the client's and others' faith and trust in the Public Defender which is so necessary to proper administration of criminal justice. As the Supreme Court stated:

"Persons charged with crime must have ultimate faith in their attorney and such faith may be slow to develop when the attorney is court-appointed and not retained. Without faith in counsel, the criminal defendant may not freely communicate information necessary to an adequate defense."

129 Ariz. at 73-74, 628 P.2d at 956-957.

In conclusion, we reaffirm the finding of our Opinion No. 89-08, *supra*, that the Public Defender's office constitutes a

firm for purposes of ER 1.10. The imputed disqualification principles of that Rule govern the situation where the Public Defender attempts to set up a conflicts division within his own office. Absent appropriate consent by the client after consultation, the Public Defender's Office would be precluded by the current rules from establishing a conflicts division. However, it is important to note that there are some conflicts that will not be cured even through client consent: the Comment to ER 1.7 makes clear that it is inappropriate to request consent from the client "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances." It is possible that the County could accomplish its objective by establishing a separate office, with no ties to the Public Defender, to handle conflict cases. Such an office would not run afoul of ER 1.10 if it were sufficiently separate, both in operation and in management, that it would constitute a separate "firm" within the meaning of ER 1.10.